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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

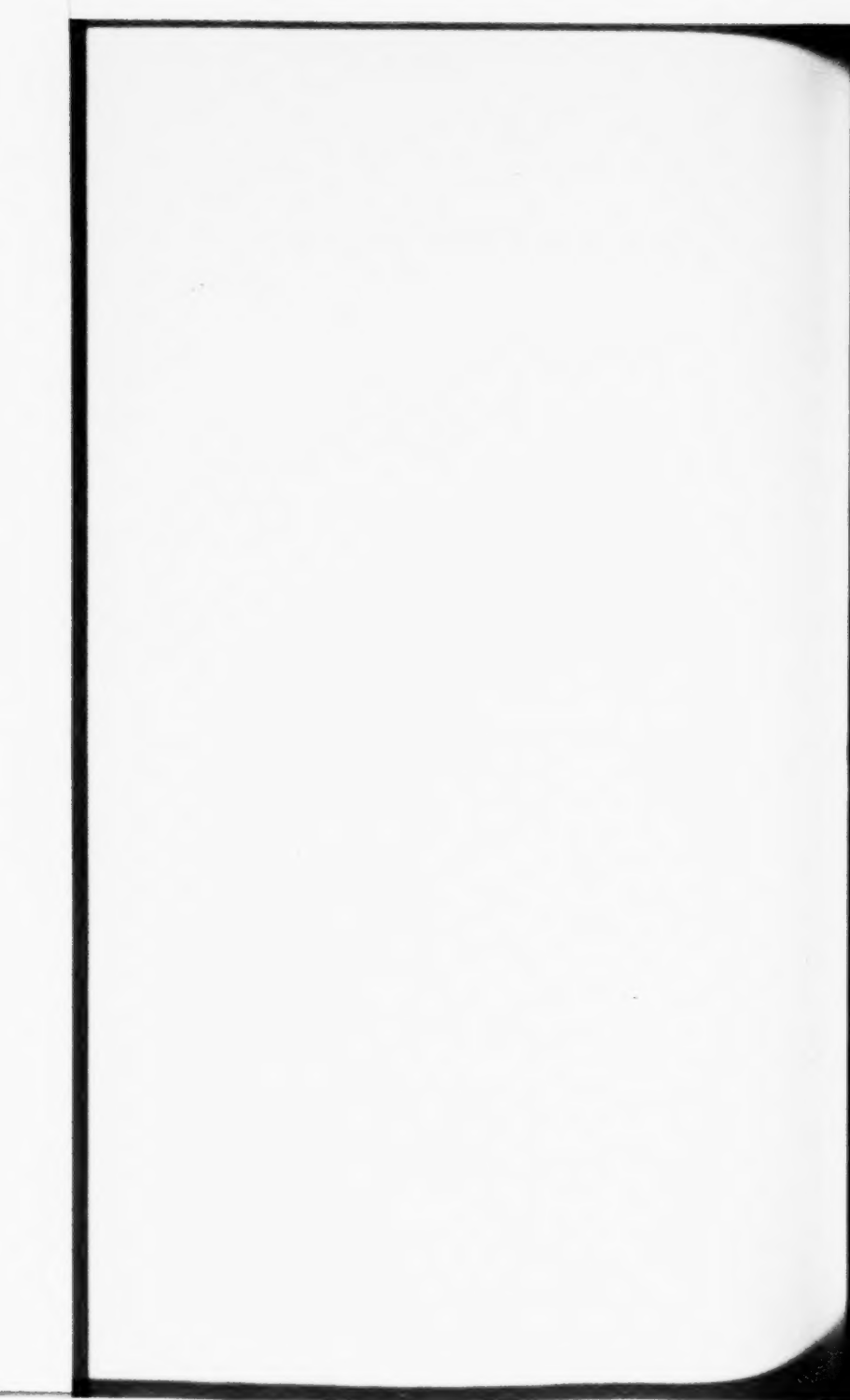
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Constitutional Provisions and Statutes Involved

In addition to the Sixth Amendment to the Constitution, the following constitutional articles and statutes are involved:

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No person shall be . . . deprived of life, liberty or property, without due process of law."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No State shall . . . deprive any person of life, liberty or property, without due process of law."

ILLINOIS CONSTITUTION 1870, ARTICLE 2, SECTION 9:

"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the country or district in which the offense is alleged to have been committed."

ILLINOIS REVISED STATUTES, CHAPTER 38, SECTION 115-4(h):

"A trial by the court and jury shall be conducted in the presence of the defendant unless he waives the right to be present."

Question Presented for Review

Is a defendant in a criminal proceeding denied his constitutional rights when he is excluded from the courtroom during the *voir dire* examination of jurors and the presentation of the prosecution's case?

A R G U M E N T

I.

The Sixth Amendment Gives the Respondent the Right to Be Confronted With the Witnesses Against Him.

A. THE RIGHT OF CONFRONTATION IS MANDATORY. IT CANNOT BE INVOLUNTARILY WAIVED.

The Sixth Amendment provides that the defendant in a criminal proceeding shall be confronted with the witnesses against him.¹ It is a fundamental right essential to a fair trial.² It is one of the fundamental guarantees of life and liberty.³ Except for a voluntary absence from court once the trial begins, this right cannot be waived.⁴

In discussing the right of confrontation and why it cannot be waived, Mr. Justice Harlan, speaking for the Court in *Hopt v. Utah*,⁵ said:

“We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a

¹ *Hopt v. Utah*, 110 U.S. 574 (1884); *Shields v. United States*, 273 U.S. 583 (1927).

² *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

³ *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899).

⁴ *Lewis v. United States*, 146 U.S. 370, 372 (1892).

⁵ 110 U.S. 574, 579 (1884).

mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the production of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

Petitioner cites no case which distinguishes or limits *Hopt* or *Lewis*. Petitioner relies upon dictum in *Diaz v. United States*.^{*} The *Diaz* case is distinguishable on its facts. In

^{*} 223 U.S. 442 (1912).

Diaz, the trial was conducted in accordance with the rules of procedure of the Spanish law; the defendant had no right to a speedy trial or a jury trial. The case was conducted as if it was civil litigation. The Sixth Amendment to the United States Constitution was not applicable but rather a section of the Philippine Civil Government Act (which did not include the right of confrontation). Mr. Diaz expressly consented to some of the evidence introduced in his absence and some of the evidence was introduced by his own attorney. In the case before the Court, Allen objected to being removed and demanded the right to confront the witnesses against him (A. 26, 33).

Petitioner in a footnote states that "the force of *Hopt* and *Lewis* was further diminished by Mr. Justice Cardozo ... in *Snyder v. Massachusetts*."⁷ Petitioner supports his statement by quoting out of context from a sentence and a footnote. Petitioner knows that Respondent's case is based on *Hopt* and *Lewis*. If these cases were diminished or limited by *Snyder* or any other case Petitioner would have elaborated in greater detail.

B. HISTORICAL ORIGIN REQUIRING THE DEFENDANT'S PRESENCE AND THE RIGHT OF CONFRONTATION.

Petitioner has implied that the right of confrontation evolved from the requirement that a defendant's presence was necessary at a criminal proceeding. This is not true. In earliest times the presence of the defendant was necessary because the trial was by "ordeal" or "battle."⁸ In both

⁷ 291 U.S. 97 (1934).

⁸ G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18-21 (1916).

instances a verdict could not be reached without the defendant's actual presence. As the jury system developed the presence of the defendant was essential for him to present the dispute, accept the jurisdiction of the tribunal and wage battle or defend (he was not permitted counsel).⁹ (There was no procedure by which to try an accused who did not appear; an accused who did not appear was made an "outlaw.")¹⁰

The right to confront witnesses did not appear in the common law until the 17th Century.¹¹ Its exact origin is not known but its inclusion in the Sixth Amendment was either because of the evils of the Star Chamber¹² or as a result of the abuses in the trial of Sir Walter Raleigh.¹³

C. THE PURPOSE OF THE RIGHT OF CONFRONTATION.

The right of confrontation serves a two-fold purpose. It gives the defendant an opportunity to face and cross-examine the witness and enables the judge and jury to

⁹ G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18-21 (1916).

¹⁰ G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18, 20 (1916).

¹¹ F. Heller, *The Sixth Amendment to the Constitution of the United States, A Study in Constitutional Development* (1951).

¹² Sir Harry L. Stephen, *The Trial of Sir Walter Raleigh*, Transactions of the Royal Historical Society, Fourth Series, II 172 (1919).

¹³ H. Hadley, *The Reform of Criminal Procedure*, Vol. X, No. 3, Acad. Pol. Sci. Proc. 94 (1923); Sir Walter Raleigh was convicted of treason in 1603. He was tried by examination without witnesses. The only evidence against him was the (unsworn) letters of Lord Cobham who had earlier confessed to treason. The trial is reported at II *Howell's State Trials* 1.

observe the witness' conduct and demeanor on the witness stand.¹⁴

Respondent concedes there are exceptions to the right of confrontation (dying declarations, documentary evidence, and when a witness is absent by the defendant's wrongful procurement). But this Court has steadfastly refused to make additional exceptions. In *Kirby v. United States*, 174 U.S. 47 (1899), this Court declared unconstitutional a statute which provided that in prosecutions for receiving stolen property the fact of the theft might be established by the record of the conviction of the thief. And in *Barber v. Page*, 390 U.S. 719 (1968), this Court held that if the absence of the witness cannot be attributed to any suggestion, procurement or act of the defendant, the Sixth Amendment will stand as a bar to reading any testimony given by an absent witness prior to the trial even though the defendant had been present at the time such testimony had been given.

Petitioner contends that the right to confront witnesses exists only in capital cases. Although the right of confrontation has been relaxed somewhat in misdemeanor cases,¹⁵ there is nothing in the Constitution or the case law which abridges this right in any type of felony case. If Petitioner's proposition is correct then the abolition of the death penalty or the trial of a defendant for a non-capital felony would permit a *de facto* constitutional amendment nullifying the right of confrontation.

¹⁴ *State ex rel. Gladden v. Loneygan*, 201 Ore. 163, 269 P.2d 491, 496 (1954); H. Hadley, *The Reform of Criminal Procedure*, Vol. X, No. 3, Acad. Pol. Sci. Proc. 94 (1923).

¹⁵ *People v. Alexander*, 293 N.Y.S. 2d 138 (1968), Federal Rules of Criminal Procedure, 18 U.S.C. Rule 26.

D. HOW TRIAL COURTS HAVE DEALT WITH THE UNRULY DEFENDANT.

Petitioner cites three trial court cases (and several commentators) as authority for the proposition that a defendant's right to be present is waived when his behavior is unruly. Two of the cases were English cases¹⁶ (in one the person was on trial for a misdemeanor).¹⁷ The American case¹⁸ did not discuss a defendant's Sixth Amendment rights. The fact that no other decisions can be found suggests that in other instances the unruly defendant was not removed but was kept in court by force. In *People v. Loomis*, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938), when the defendant persisted in using profane expressions, fought with officers in the court, kicked the counsel table and threw himself on the floor, he was strapped to a wheel chair with a towel placed over his mouth. And in *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963), when one of the defendants climbed into the jury box and pushed the jurors in the front row, screaming vilifications, and another defendant during the course of his testimony threw a chair at the prosecuting attorney, they were gagged and shackled.

Petitioner suggests that the use of gags and shackles may turn the jury's sympathies in the defendant's favor. This conclusion is conjecture. One commentator believes that these restraints will expedite a conviction.¹⁹

¹⁶ *Regina v. Berry*, 104 L.T.J. 110 (Northhampton Assizes, 1897); *Rex v. Browne*, 70 J.P. 472 (London Cent. Crim. Ct. 1906).

¹⁷ *Rex v. Browne*, 70 J.P. 472 (London Cent. Crim. Ct. 1906).

¹⁸ *United States v. Davis*, 25 Fed. Cas. 773 (No. 14,923) (C.C.C., S.D.N.Y. 1869).

¹⁹ P. Murray, *The Power to Expel a Criminal From His Own Trial, A Comparative View*, 36 U. Colo. L.R. 171, 173 (1964).

Besides physical restraint and the contempt power, there are two other methods by which a Court can deal with an unruly defendant. First, the defendant could be removed to another room and the trial televised to him. Secondly, the defendant could be seated in a soundproof booth in the courtroom from where he can see and hear the proceedings.²⁰ In each instance the defendant could "confront" the witnesses and communicate with his attorney by telephone.

E. THE DANGER INHERENT IN PERMITTING THE EXCLUSION OF AN UNRULY DEFENDANT.

To permit an unruly defendant to be excluded from the trial is to condition the right of confrontation upon good behavior. If this becomes the law by what standards would a judge determine when a defendant misbehaves to the point where he can be excluded?

Was Allen abusive or unruly? Respondent does not believe so. If Allen was unruly it was only on three occasions, (1) when he was denied the right to represent himself (A. 25-27), (2) when the trial was to commence without him being able to notify his family and friends (A. 32-33), and (3) when he was brought into Court in shackles and a prison uniform the first time to be identified by a witness (A. 38). The other times Allen was in court—during the prosecution's case to be identified and for his defense—he conducted himself properly. Even if Allen was unruly, his actions were mild in comparison to some of the defendants before Judge Harold R. Medina in the trial of the Communist leaders²¹ or some of the defendants now on trial

²⁰ This procedure was used in the sanity hearing for James B. Merkouris in Los Angeles in 1956.

²¹ See *United States v. Sacher*, 9 F.R.D. 394 (1950).

before Judge Julius J. Hoffman in the "Chicago conspiracy trial".²²

If the threat of exclusion does not accomplish the desired result of controlling and quieting a defendant, may a trial court escalate by denying some other rights, e.g. jury trial, right to counsel?

II.

The Case Is Moot.

Allen, after being in jail since 1957, was paroled on April 21, 1969. He will be discharged from his parole on April 21, 1971. If the decision of the Court of Appeals is reversed Allen will remain on parole. If the decision is affirmed Allen will be released (in view of *North Carolina v. Pearce*,²³ it is doubtful that he will be retried). The case is therefore moot because any decision will not affect either of the parties.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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January 27, 1970

²² *United States v. Dellinger*, 69 CR-180 (U.S.D.C., N.D. Ill, 1969).

²³ 395 U.S. 711 (1969).

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